Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors

HIGH COURT (KOTA BHARU) — ORIGINATING SUMMONS NO 24–269–91
IDRIS YUSOFF J
18 OCTOBER 1993

Landlord and Tenant *— Tenancy or licence — Defendants enjoyed exclusive possession and made monthly payment — Agreement stated licence conferred on defendants — Intention of parties of paramount importance — Exclusive possession not a decisive test*

Land Law *— Licence — Mutual termination to facilitate new arrangement — New arrangement not entered into — Whether defendants could continue to occupy premises*

Land Law *— Trespass — Termination of licence — Continued occupation*

Land Law *— Licence — Termination — Recovery of possession of premises — Summary procedure — Licence to enter premises terminated — Application for recovery of possession of premises did not mention recovery of land — Whether O 89 procedure available — Rules of the High Court 1980 O 89*

Land Law *— Land and fixtures — Plant on land — Whether formed part of land — Considerations to be taken into account*

The plaintiffs applied by way of originating summons pursuant to O 89 of the Rules of the High Court 1980 ('the RHC') for an order to recover possession of certain land belonging to them on the ground that the defendants were occupying the land without the licence or consent of the plaintiffs. The plaintiffs and defendants had enjoyed a good business relationship and had entered into several agreements, including the agreement relating to the land in dispute ('the KBBP Agreement'). After the business relationship turned sour, the plaintiffs terminated the agreements with the exception of the KBBP Agreement which was allegedly mutually terminated to facilitate the execution of a fresh agreement. The defendants contended that had it not been for the plaintiffs' promises, the defendants would not have agreed to the mutual termination.

The defendants maintained that the KBBP Agreement was a tenancy agreement and/or created a tenancy at law for a consideration. The defendants contended that summary proceedings under O 89 were inappropriate because: (i) the notice of termination of the KBBP Agreement only referred to the right to use the plant on the land and not the land itself and therefore did not come within the ambit of O 89; and (ii) the question of various improvements which they had brought to the site could only be resolved through a proper hearing. From the affidavit evidence, three issues arose for the determination of the court: (i) whether a tenancy or a licence had been created; (ii) if a licence was created, whether there was a proper determination of such licence; and (iii) considering the facts and circumstances of the case, whether the application under O 89 was proper.

Held, allowing the plaintiff's application:

(1) The most important factor in determining whether there is a tenancy is the intention of the parties. While exclusive possession is an essential requirement of a tenancy, it is also not the sole and only criterion; there may be other circumstances negativing an intention to create a tenancy. Having regard to all the circumstances of the case, the relationship of the parties was only that of licensor and licensee. Judging from the terms of the KBBP Agreement and the circumstances and conduct of the parties, all that was intended was that the defendants would only have the privilege of making use of the plant with no interest in the land at all. In the absence of sufficient interest being conferred upon them, the defendants could not claim that a tenancy had been created.

(2) Although the termination of the KBBP Agreement was actuated by the proposal to 'work out a new and different arrangement' which never materialized, the termination had been mutually agreed to by both parties and was valid and proper. However, the defendants were at liberty to file an action seeking appropriate remedies for the new arrangements which never materialized.

(3) If the defendants insisted on entering or remaining on the land or in otherwise exercising its licence, notwithstanding the revocation of its licence (even if it was wrongful), it became a trespasser and liable in an action at the suit of the plaintiffs.

(4) The mere fact of physical attachment is not conclusive to deem an article a fixture; what is of greater importance is the object of annexation rather than the mode. Considering the purposes for which the various types of equipment were intended to be used, they clearly showed that the plant was a permanent attachment to the land, thereby forming part of the land.

(5) The defendants' occupation of the land was by virtue of the licence to enter the plant and, as a corollary the termination of such licence, went with it the right to recover possession of the land. Therefore, there was no impediment to the use of O 89 for the recovery of the land or, as an alternative, the plaintiffs could go by way of normal litigation for the recovery of the plant which would lead to the subsequent recovery of the land.

(6) No time frame is imposed on O 89 proceedings. Therefore, laches ought not present any impediment to the use of O 89 for the recovery of land.

Per curiam:

(1) Where a case is to be decided on affidavit evidence, the affidavit must reply specifically to the allegations raised, otherwise the allegations must be taken to have been accepted.

(2) Admissions are the strongest evidence possible and even a wrong construction of a document will be assumed to be correct in view of the admission.

[Bahasa Malaysia summary

Plaintif telah memohon melalui satu saman pemula menurut A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk satu perintah mendapat balik pemilikan tanah-tanah tertentu kepunyaan mereka atas alasan bahawa defendan telah menduduki tanah itu tanpa lesen atau persetujuan plaintif. Plaintif dan defendan telah menjalin satu hubungan perniagaan yang baik dan telah mengikat beberapa perjanjian, termasuk perjanjian berkenaan dengan tanah yang dipertikaikan ('Perjanjian KBBP'). Selepas hubungan perniagaan itu beransur buruk, plaintif telah menamatkan perjanjian-perjanjian itu kecuali Perjanjian KBBP itu yang didakwa telah ditamatkan dengan persetujuan bersama untuk memudahkan penyempurnaan suatu perjanjian yang baru. Defendan menegaskan bahawa kalaulah bukan kerana janji-janji plaintif, defendan tidak akan bersetuju menamatkan Perjanjian KBBP melalui persetujuan bersama. Defendan menegaskan bahawa Perjanjian KBBP itu adalah suatu perjanjian penyewaan dan/atau membentuk suatu penyewaan di sisi undang-undang untuk pembalasan.

Defendan berhujah bahawa prosiding terus di bawah A 89 tidak sesuai kerana: (i) notis penamatan Perjanjian KBBP itu cuma merujuk kepada hak menggunakan loji yang terletak di tanah itu dan bukan tanah itu sendiri dan lantaran itu tidak termasuk dalam batasan A 89; dan (ii) soalan mengenai berbagai perbaikan yang telah mereka bawa kepada tapak itu hanya boleh diselesaikan melalui suatu perbicaraan penuh. Dari keterangan afidavit, tiga isu timbul untuk penentuan mahkamah: (i) sama ada suatu penyewaan atau suatu lesen telah dibentuk; (ii) jika suatu lesen telah dibentuk, sama ada terdapat penamatan lesen itu yang betul; dan (iii) memandangkan fakta-fakta dan keadaan kes itu, sama ada permohonan di bawah A 89 adalah berpatutan.

Diputuskan, membenarkan permohonan plaintif itu:

(1) Faktor yang paling penting dalam menentukan sama ada terdapat suatu penyewaan adalah niat pihak-pihak yang berkenaan. Sedangkan pemilikan eksklusif adalah suatu kehendak yang wajib bagi satu penyewaan, ianya juga bukan ukuran yang tunggal; mungkin terdapat keadaan lain yang menidakkan niat membentuk suatu penyewaan. Memandangkan kesemua keadaan kes, hubungan di antara pihak-pihak itu cuma setakat pemberi lesen dan pemegang lesen. Mempertimbangkan terma-terma Perjanjian KBBP dan keadaan kes serta kelakuan pihak-pihak itu, apa yang dihasratkan adalah defendan akan cuma mendapat hak istimewa menggunakan loji itu tanpa mendapat kepentingan di dalam tanah itu sama sekali. Tanpa kepentingan yang mencukupi yang diberikan kepada mereka, defendan tidak boleh menuntut bahawa suatu penyewaan telah dibentuk.

(2) Walaupun penamatan Perjanjian KBBP itu disebabkan oleh cadangan untuk 'merancang suatu penyusunan yang baru dan berlainan' ('work out a new and different arrangement') yang tidak pernah berlaku, penamatan itu telah dipersetujui bersama oleh kedua-dua pihak itu dan adalah sah dan betul. Namun

demikian, defendan tidak dihalang daripada memulakan tindakan untuk menuntut remedi yang sesuai untuk penyusunan baru yang tidak pernah berlaku itu.

(3) Jika defendan berkeras hendak memasuki atau terus menduduki tanah itu atau selainnya menjalankan lesen itu, meskipun pembatalan lesennya (biarpun ianya salah), ia menjadi seorang penceroboh dan bertanggungan di dalam suatu tindakan yang dimulakan oleh plaintif.

(4) Hakikat semata-mata pemasangan fizikal bukanlah fakta muktamad untuk menyifatkan sesuatu benda sebagai lekapan; apa yang lebih penting adalah tujuan aneksasi dan bukannya cara aneksasi. Memandangkan bagaimana berbagai jenis jentera itu digunakan, jelas ditunjukkan bahawa loji itu adalah suatu pemasangan tetap kepada tanah itu, dan oleh itu membentuk sebahagian daripada tanah itu.

(5) Pendudukan tanah itu oleh defendan adalah menurut lesen untuk memasuki loji itu dan, bersama dengan penamatan lesen tersebut, turut mengikut adalah hak untuk mendapat balik pemilikan tanah itu. Jadi, tidak terdapat halangan terhadap penggunaan A 89 untuk mendapat balik tanah itu, atau sebagai pilihan lain, plaintif boleh mengikut jalan guaman yang biasa untuk mendapat balik loji itu yang akan membawa kepada pengambilan balik tanah itu.

(6) Tidak ada tempoh masa yang dikenakan atas prosiding di bawah A 89. Oleh itu, kelengahan (laches) tidak patut mendirikan sebarang halangan kepada penggunaan A 89 untuk mendapat balik tanah.

Per curiam:

(1) Apabila sesuatu kes bakal ditentukan berdasarkan keterangan afidavit, afidavit itu semestinya menjawab secara terperinci kepada dakwaan-dakwaan yang diketarakan, jika tidak dakwaan-dakwaan itu akan dikira sebagai telah diterima.

(2) Pengakuan adalah keterangan yang paling kuat yang mungkin diperolehi, bahkan satu pentafsiran sesuatu suratcara yang salah akan disifatkan sebagai betul memandangkan pengakuan itu.]

[*Editorial Note*: The defendants have appealed to the Supreme Court.]

Notes

For cases on trespass upon termination of a licence, see 8 *Mallal's Digest* (4th Ed) paras 2132–2133.

For cases on land and fixtures, see 9 *Mallal's Digest* (4th Ed) paras 1419–1440.

Cases referred to

1 *McPhail v Persons, Names Unknown* [1973] Ch 447; [1973] 3 All ER 393; [1973] 3 WLR 71 (refd)

2 *Bristol Corp v Persons Unknown* [1974] 1 All ER 593; [1974] 1 WLR 365 (refd)

3 *Greater London Council v Jenkins* [1975] 1 All ER 354; [1975] 1 WLR 155 (refd)

4 *Kuppu v Brown & Anor* [1960] MLJ 59 (folld)
5 *Goh Gin Chye & Anor v Peck Teck Kian Realty Pte Ltd & Anor* [1987] 2 MLJ 118 (folld)
6 *Mohamed Mustafa v Kandasami* [1979] 2 MLJ 109 (folld)
7 *Tee Than Song v Caltex Oil Malaysia Ltd* [1970] 1 MLJ 68 (folld)
8 *Leigh & Ors v Taylor & Ors* [1902] AC 157 (refd)
9 *Khaw Joo Jeang & Ors v Koay Seng Chye & Ors*[1960] MLJ 203 (folld)
10 *Shell Company of the Federation of Malaya Ltd v Commissioner of the Federal Capital of Kuala Lumpur* [1964] MLJ 302 (refd)
11 *Material Trading Pte Ltd (in liquidation) v DBS Finance Ltd* [1988] 2 MLJ 162 (refd)
12 *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 (refd)
13 *Australian Widows' Fund Life Assurance Society Ltd v National Mutual Life Association of Australasia Ltd* [1914] AC 634; (1914) 17 CLR 657; [1914] VLR 344 (refd)
14 *Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Ors* [1993] 1 AMR 279; [1993] 1 MLJ 12 (distd)

Legislation referred to
Rules of the High Court 1980 O 89

M Rajasekaran (*Foo Say Ghee* with him) (*Raja, Darryl & Loh*) for the plaintiffs.
MS Nayagam (*Ahmad Rastom & Nayagam*) for the defendants.

Idris Yusoff J: Esso Malaysia Sdn Bhd, the plaintiffs herein, apply by way of originating summons for an order that they do recover possession of the lands held under Grant No 7485 Lot No 231 and Grant No 7486 Lot No 233 both in Section 13 Kota Bharu, Kelantan or otherwise known as Section 13 Lorong Minyak Gas Kota Bharu, Kelantan ('the said lands') on the ground that the plaintiffs are entitled to possession of the said lands as the person or persons in occupation thereof are occupying without licence or consent of the plaintiffs. It is to be noted that the application is for recovery of the lands only and does not include the plant as is made out to be in the English translated version of the originating summons.

The said application is made pursuant to O 89 of the Rules of the High Court 1980 ('the RHC') which provides for summary proceedings for recovering possession of land in circumstances set out therein. The originating summons is supported by the affidavits of Encik Mohd Shah bin Haji Hamzah, the plant and terminal manager of the plaintiffs. An affidavit sworn by the second defendant on behalf of all the defendants, strongly resisting the plaintiffs' said application, has also been filed.

The background facts as can be gathered from the affidavits and the various agreements exhibited are that since the early 1980s the parties had established good business relationship, and as a result they had entered into several agreements, namely:

(a) the kerosene wholesalership agreement dated 15 July 1981 (MS–3);
(b) the sale/purchase agreement of petroleum products dated 1 May 1983 (NS–4);
(c) the Essogas dealer agreement dated 30 January 1984 (MS–5);
(d) the haulage agreement dated 2 November 1985 (MS–9); and
(e) The Kota Bharu bulk plant contract operation agreement dated 1 December 1986 — 'the KBBP Agreement' (MS–10).

The parties seemed to continue enjoying a good relationship until the later part of 1988 when apparently their business relationship turned sour which resulted in the termination of the aforesaid agreements by the plaintiffs pursuant to the powers reserved to them in the various agreements with the exception of the KBBP Agreement which termination is claimed to have been mutually agreed on. The various notices served on the defendants by the plaintiffs are:

(a) for the kerosene wholesalership agreement, the notice of termination of which was dated 10 February 1989 (MS–6);
(b) for the sale/purchase agreement of petroleum products, the notice of termination of which was dated 31 January 1989;
(c) for the Essogas dealer agreement, the notice of termination of which was dated 31 January 1989;
(d) for the haulage agreement, the notice of termination of which was dated 22 September 1988;
(e) for the KBBP Agreement, the notice of acceptance by the defendants to the mutual termination of the agreement of which was dated 2 October 1988 (MS–12).

Be that as it may, the defendants dispute the legal effect of the various notices and more particularly, in regard to the acceptance of mutual termination of the KBBP Agreement in which the defendants allege that the reason behind the termination was purely and simply for the purpose of facilitating a fresh agreement to be entered into between the parties. The defendants further contend that had it not been for the plaintiffs' promises and representations, the defendants would not have agreed to the mutual termination of the said agreement. It is therefore in respect of and pursuant to the termination of the KBBP Agreement that the substratum of the present action is formed.

Whilst it is not disputed that the said lands are registered in the name of the plaintiffs, the defendants however disagree that the KBBP Agreement only confers upon them a licence merely as a personal privilege creating no interest in the plaintiffs' said lands. The defendants maintain that the KBBP Agreement is indeed a tenancy agreement and/or creates a tenancy at law for a consideration. The said agreement purports to grant the defendants the right to enter the plant, ie the plaintiffs' Kota Bharu bulk plant, and to make use of the plant and equipment as set out in exhs A and B to the said agreement.

Consequent upon the termination of the KBBP Agreement, the plaintiffs, relying on their right to possession of the lands and the plant thereon, demanded delivery of vacant possession of the same from the defendants as

evidenced in the series of letters of various dates. Seeing no response from the defendants, the plaintiffs finally got their solicitors to give a notice to the defendants, reiterating that any licence the defendants may have acquired over the said lands and the plant had been determined and accordingly demanded delivery of vacant possession of the same (MS–19). Despite the said letter, the defendants still refused and continued to remain in occupation.

The defendants, apart from alleging that a tenancy has been created, also raise the question of various improvements they had brought to the site including the installation of certain machinery, motors and pipelines other than the usual obligation of continuously maintaining the plant, which question they say can only be resolved through a proper hearing and not by resorting to the summary proceedings envisaged in O 89.

Order 89 r 1 provides:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

The law is settled that the summary proceedings for possession of land can be employed in a situation where a person entitled to possession of the land claims possession of such land occupied by another person without his licence or consent or the licence or consent of any of his predecessor-in-title or in another situation where a person who has entered into occupation of the land with the licence or consent of the person entitled to possession of the land or any of his predecessor-in-title but remains in such occupation without licence or consent of the person entitled to possession or any predecessor-in-title of his. See *McPhail v Persons, Names Unknown*;[1] *Bristol Corp v Persons Unknown*[2] and *Greater London Council v Jenkins*.[3] In the instant case, what the plaintiffs claim is that no doubt the defendants entered into occupation of the lands with their licence or consent but that licence or consent had already been withdrawn and terminated. Such being the situation, it is alleged that the defendants have no further right to continue remaining on the lands and the consequent use of the plant.

From the affidavit evidence, there seems to be three issues that require determination by the court, namely:

(1) whether there was created a tenancy or a licence;
(2) if a licence was created whether there was a proper determination of such licence; and
(3) considering the facts and circumstances of the case, whether the application under O 89 of the Rules of the High Court is proper.

As regards the first issue, the plaintiffs maintain that the KBBP Agreement is explicit in that it confers on the defendants only 'a licence to enter the plant and make use of the company's plant equipment thereon ...' and not to any interest in the land. There is spelt out in the agreement that 'the company [plaintiffs] hereby grant to the contractor [defendants] a licence as a personal privilege creating no interest in the land to enter the plant for the purpose of ...'. Again, it is stressed in cl 12(ii) that the agreement shall

not operate or be construed as a tenancy agreement or an agreement to create a tenancy over the plant and the equipment therein. For the defendants, as stated earlier, it is argued that the KBBP Agreement creates a tenancy and in reality the RM200 payable by the defendants is a monthly rent. In other words, the exclusive possession enjoyed by the defendants coupled with payment of RM200 per month are all the indicia of tenancy. Whilst it may be true that these factors may carry some weight, what is considered to be of paramount importance is the intention of the parties.

In *Kuppu v Brown & Anor*[4] the Court of Appeal in a majority decision held:

> (1) the question of whether a person is a tenant or a licensee is a question depending upon the intention of the parties and the law does not impute intention to enter into legal relationships when the circumstances and conduct of the parties negative any such intention; ...

In *Goh Gin Chye & Anor v Peck Teck Kian Realty Pte Ltd*,[5] the Singapore Court of Appeal held:

> (1) the intention of the parties is an important consideration in determining the relationship of landlord and tenant as in all other contractual relationships, but in every case the intention 'must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances'. What the parties said or professed in the agreement alone is not enough; it does not alter what is, in effect, a tenancy into a licence, and vice versa;
> (2) the relationship of the parties is determined by law, having regard to all the relevant circumstances and not by the label they chose to put on the agreement;
> (3) a material circumstance in the consideration of the relationship of landlord and tenant is exclusive possession of the property enjoyed by the occupier and exclusive possession is an essential requirement of a tenancy. However, exclusive possession is also not the sole and only criterion; there may be other circumstances negativing an intention to create a tenancy; ...

In another Malaysian case, *Mohamed Mustafa v Kandasami*,[6] the Federal Court held at p 118:

> This court has, in Federal Court Civil Appeal No 64 of 1978, between *Woo Yew Chee* and *Yong Yong Hoo* [1979] 1 MLJ 131 decided that exclusive possession is no longer a decisive test to determine that a tenancy has been created. *Hill and Redman's Law of Landlord and Tenant* (15th Ed) at p 17 puts it this way: firstly, if there is no right of exclusive possession the transaction cannot be a lease. Secondly, if there is a right of exclusive possession the transaction may be either a lease or a licence depending on all the relevant circumstances. The test that this court in *Woo Yew Chee*'s case, supra, applied is 'the nature and quality of the occupancy: whether it is intended that the occupier should have a stake in the premises sub-let or whether he should have only a personal privilege' and applying this test, it came to the conclusion that the respondent Yong Yong Hoo's interest in a half-portion of the ground floor was a tenancy. The same conclusion was reached in *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513. Each case must of course be considered on the facts pertinent to it.

Having regard to all circumstances of the case, I am of opinion that the relationship of the parties is that only of licensor and licensee. Judging from the terms of the KBBP Agreement and the circumstances and conduct of

the parties they clearly show that all that was intended was that the defendants would only have the privilege of making use of the plant with no interest in the land at all. In the absence of sufficient interest being conferred upon them, the defendants cannot claim that a tenancy has been created though undeniably they have possession of the plant. A

Coming to the second issue, it is contended by the defendants that there was no termination of the tenancy/licence to occupy the lands. What is envisaged and indeed to be considered is the termination of occupation of the bulk plant. This line of argument is pursued in view of the letter dated 21 November 1989 from the plaintiffs' solicitors to the first defendant, exh MS–19. Counsel for the defendants argues that exh MS–19 supersedes the earlier letter of mutual termination exhibited as MS–12. He points out that what can be gathered from MS–19 is the termination of the licence to occupy the bulk plant and the demand for its vacant possession — there is no mention of recovery of the lands. B C

Referring to exh MS–12 (there are two letters which comprise MS–12), counsel for the defendants says from its tone it does not constitute 'a final termination but a prelude to an arrangement between the parties ... MS–12 envisages a subsequent formal agreement. It does not mutually terminate the alleged licence to occupy the lands.' Counsel maintains that the mutual termination of the KBBP Agreement was the result of certain representations made by the plaintiffs which induced the defendants into agreeing to the termination. D E

For the plaintiffs, it is argued that since the licence granted to defendants has been terminated, their continued occupation of the bulk plant and the said lands is unlawful. The exh MS–19 cannot, on any account, be said to have superseded MS–12.

On perusal of MS–12, it is clear to me that the termination of KBBP Agreement has been mutually agreed to by both parties. The fact that the termination may be actuated by the proposal to 'work out a new and different arrangement' or otherwise, matters not. The termination is valid and proper. F

Again looking at MS–19, I do not consider it to have superseded MS–12. It is in fact a final notice from the plaintiffs' solicitors that court proceedings would be instituted in the event of the defendants refusing to give up possession of the bulk plant and the said lands. Paragraph 2 of MS–19 alleges that the defendants are unlawfully occupying the bulk plant. In this respect, it is obvious that the alleged occupation would not be unlawful but for the termination of the licence since the defendants had lawfully entered the bulk plant. Paragraph 3 of MS–19 refers to the plaintiffs' earlier letters to the defendants and their repeated demands which unfortunately appear to have been ignored. Paragraph 4 clearly indicates that the licence previously given to the defendants had been determined and the subsequent paragraphs demand delivery of vacant possession of the bulk plant, the skid tank and the ancillary equipment within a certain period of time. On the strength of the fact aforesaid, the argument of supersession of MS–12 by MS–19 does not seem to me to hold any water. G H I

If the defendants are mindful of their rights to a new arrangement which unfortunately never materialized, they are of course at liberty to file an action seeking appropriate remedies.

To allow the defendants in the circumstances to brush aside the mutual termination of KBBP Agreement relying on fraud, cheating and misrepresentation allegedly perpetrated by the plaintiffs seems to be in direct conflict with the principle enunciated by the Federal Court in *Tee Than Song v Caltex Oil Malaysia Ltd*[7] where Ong CJ (Malaya) (as he then was) said at p 69:

> A case closely parallel to this is *Thompson v Park* [1944] 1 KB 408, where the owner of premises had revoked a licence to use them granted to another person and an interim injunction was granted to restrain the former licensee from trespassing on the premises, even though he might have a claim for damages for breach of contract against the owner of the premises in respect of the revocation of the licence. In my view the judgment of Goddard LJ is so peculiarly appropriate that I would quote it in extenso:
>
> > 'It is a strange argument to address to a court of law that we ought to help the defendant who has trespassed and got himself into these premises in the way in which he has done and to say that that would be preserving the status quo and a good reason for not granting an injunction. The strength of the argument which was put forward on the defendant's behalf was that, assuming that there had been a breach of contract on the part of the plaintiff, the defendant had a right to be where he was. That is an entire misconception of the legal position, which was that the defendant was a licensee on the premises. That licence has been withdrawn. Whether it has been rightly withdrawn or wrongly withdrawn matters nothing for this purpose. The licensee once his licence is withdrawn, has no right to re-enter on the land. If he does, he is a common trespasser. The law is properly laid down in the following passage in *Salmond on Torts* (9th Ed) at p 258: "He who is ejected from land by the licensor in breach of his licence, or is otherwise disturbed by the licensor in the exercise of it, has even at common law, and notwithstanding *Wood v Leadbitter* (1845) 13 M & W 838, a good cause of action in contract" — see *Kerrison v Smith* [1897] 2 QB 445 — "If however, the licensee insists, notwithstanding the revocation of his licence (even though it is thus premature and wrongful) in entering or remaining on the land or in otherwise exercising his licence, he becomes at common law a trespasser or other wrongdoer, and liable in an action accordingly at the suit of the licensor. The rule is an illustration of the difference between a legal power to do a thing effectively and a legal right or liberty to do it lawfully. A licensor has at common law the power to revoke the licence at any time, but he has no right to revoke it before the expiration of the term." As this is an interlocutory proceeding it is convenient, instead of going through a large number of cases, simply to state the opinion of a leading textbook writer of great authority with which I entirely agree.'

The last issue to consider is whether in the circumstances, the employment of O 89 of the RHC is proper. Counsel for the defendants claims that what has been the subject-matter in the notice is the termination of the right to enter the bulk plant and it does not come within the ambit of O 89 which specifically deals with summary proceedings for possession of land. He maintains that affidavit evidence is not sufficient to resolve the status of the bulk plant — whether it is deemed a fixture or still retains the chattel character. He says that even assuming that the bulk plant is a fixture, a reference to the bulk plant does not include land though a reference to land includes fixtures.

It is trite law that land includes fixtures. But on the contrary it cannot be dismissed that fixtures do form part of the land — this is especially so when there is a permanent attachment to the land. This principle is based on a general rule of great antiquity that 'whatever is affixed to the soil belongs thereto' as the maxim goes 'quicquid plantator solo, solo cedit'. However it must be observed that the mere fact of physical attachment is nevertheless not conclusive to deem an article or a chattel a fixture; what is of greater importance is the object of annexation rather than the mode. Even when a chattel is actually affixed to the land but can be removed without damage to it or the premises to which it is attached and the annexation is merely for a temporary purpose and for the more complete enjoyment and use of it as a chattel, it will not in the circumstances lose its chattel character and will not become part of the land — see *Leigh & Ors v Taylor & Ors*.[8] One of the local cases on this aspect of the law is *Khaw Joo Jeang & Ors v Koay Seng Chye & Ors*[9] in which it was held:

> Whether a 'building' has been so attached to the land as to become a fixture, and so form part of the land is a question of fact, or of mixed law and fact. It is common knowledge in this country — and has been repeatedly accepted by the courts as such — that certain types of houses are movable property. In the case of *Billing v Pill* [1953] 2 All ER 1061 at p 1063, Lord Goddard ... quoted with approval the following passage from *Halsbury's Laws of England* as a test for determining whether a property was ... to be regarded as forming part of the land as a fixture:
>
> > 'Whether a chattel has been so affixed to the land or building as to become a fixture depends on the object and purpose of the annexation, and if the chattel can be removed without doing irreparable damage to the premises, neither the method nor the degree of annexation, nor the quantum of damage that would be done to the chattel or to the premises by the removal, affect the question save in so far as they throw a light upon the object and purpose of the annexation. If the object and purpose was for the permanent and substantial improvement of the land or building, the article will be deemed to be a fixture, but if it was attached to the premises merely for a temporary purpose or for the more complete enjoyment and use of it as a chattel, then it will not lose its chattel character and it does not become part of the realty.'

The other local case is *Shell Company of the Federation of Malaya Ltd v Commissioner of the Federal Capital of Kuala Lumpur*,[10] in which it was held that the underground tanks buried two feet below the ground level and were turfed over or covered with concrete or macadam were land within the definition of 'land' in the Land Code (Cap 138). See also a Singapore case *Material Trading Pte Ltd (in liquidation) v DBS Finance Ltd*.[11]

It is to be noted that on looking at the KBBP Agreement, the bulk plant consists of the equipment set out in exhs A and B attached to the said agreement and considering the purposes for which the various types of equipment are intended to be used, they clearly show that the plant is a permanent attachment to the land, thereby forming part of the land — para 7 of the defendants' affidavit seems to support this. Further, the defendants' occupation of the land is by virtue of the licence given to them to enter the bulk plant and as a corollary, the termination of such licence goes with it the right to recover possession of the said lands — more so when there is a

A cessation of business relationship between both parties. Counsel for the defendants also raises the question of laches, though it is not a complete bar to the plaintiffs' claim but he says it is a heavy impediment and/or a bar to summary judgment proceedings since no plausible reason being advanced for the delay. I do not agree with his submission, particularly when there is no time frame imposed on proceedings of this nature. In the event, I hold B that there ought not to present any impediment to make use of O 89 for the recovery of the said lands or as an alternative the plaintiffs can go by way of normal litigation for the recovery of the bulk plant which leads to the subsequent recovery of the land though the procedure might be time-consuming. The option is left entirely to the plaintiffs.

C Whilst still on the KBBP Agreement I cannot help observing that there seems to arise a certain point which is undoubtedly crucial and entitled to some weighty consideration. As can be seen the cause of action arises principally from the termination of the KBBP Agreement, which agreement according, to its preamble, states that: 'The company is possessed of the D bulk plant located at Lot No 230, Lorong Minyak Gas, Kota Bharu, Kelantan, as set out in the plan attached hereto and marked exh A (hereinafter to be referred to as the 'Plant')'.

However in the originating summons, the plaintiffs apply for an order that they do recover possession of the said lands, ie Lot Nos 231 and 233. In the affidavit in support thereof, it is averred by Encik Mohd Shah bin E Haji Hamzah, the plant and terminal manager of the plaintiffs', that the plaintiffs are the registered owners of the two lands which are jointly referred to as the 'said lands' — see para 3. In para 4 of the said affidavit, it is averred that on the said lands is sited the plaintiffs' plant known as the Esso Kota Bharu Bulk Plant ('the plant'). At a glance there seems to be a F slight confusion over the lot numbers on which the plant is situated and ordinarily this would call for a certain explanation to reconcile the difference but it seems that despite this confusion, it has been put to rest by the admission made by the defendants in their affidavit-in-reply when the deponent says at para 5 thereof, 'Substantially, I do not dispute the fact in paras 1, 2, 3, 4, 5 and 6 of the Esso affidavit ...'.

G However, contrary to what has been admitted, counsel for the defendants in his submission makes a feeble attempt to deny the order sought by showing the difference in the lot numbers, but the question is, can the submission prevail over the affidavit evidence? The answer is clearly no.

It is settled law that where a case is to be decided on affidavit evidence the H affidavit must reply specifically to the allegations raised, otherwise the allegations must be taken to have been accepted. In *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd*,[12] the Supreme Court at p 385 [col 2H–I) said:

> There is force in the appellant's contention that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be I taken to have been accepted. In *Dawkins v Prince Edward of Saxe Weimar* Blackburn J stated:
>
> > 'Now, upon that if that, is the true state of the case, we are of opinion that no cause of action can be shewn. Colonel Dawkins does not meet that in the affidavit-in-reply ...'.

What is more damaging in this case is that the defendants go to the extent of admitting paras 3 and 4 of the plaintiffs' affidavit — thereby obviating the necessity for the plaintiffs to provide further proof to substantiate their averment.

Admissions are the strongest evidence possible and even a wrong construction of a document will be assumed to be correct in view of the admission. In the Privy Council case of *Australian Widows' Fund Life Assurance Society Ltd v National Mutual Life Association of Australasia Ltd*,[13] Lord Parker of Waddington delivering the judgment of the Board at p 641 said:

> *It was admitted by the appellant society in the pleadings, and assumed throughout the proceedings in the courts below and in the arguments before their Lordships' Board,* that the effect of this recital was to incorporate in the policy all the terms of the proposal for reinsurance dated 2 January 1908. Their Lordships are not satisfied that the recital has any such effect. The recital may very well mean that the directors of the society have determined to accede to the application of the respondent society for a policy of reinsurance, leaving the terms on which such policy was granted to be specified in the ordinary way in the policy itself. According to the preceding recital the policy is to incorporate the statements contained in the proposal and not the proposal itself. *Having regard, however, to the admission in the pleadings, their Lordships will assume that the recital has the effect of incorporating in the contract the terms and conditions of the document of 2 January 1908.* (Emphasis added.)

In relying on the Privy Council decision, I am aware of the Supreme Court decision in *Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Ors*[14] which held:

> The allegation of assault by the appellant's sister, without anything more, was hearsay as it was wholly unsupported by any evidence. Therefore, there was no need for an affidavit of denial to be filed by the prosecution as there was nothing to rebut and *the concession by the prosecution that the assault was common ground was erroneous, and was not binding on the court.* (Emphasis added.)

This case is, however, distinguishable in that the concession by the respondent's counsel touching upon the question of assault was mistakenly made since the allegation of assault was worthless as the evidence had been entirely hearsay.

Would it be that the admission in this case was unintentionally or erroneously made? In the affirmative I would have thought that it is incumbent upon the defendants to withdraw it, for in a specific case, a party who has unwarily made an admission will be allowed to recall it — see para 18/13/2 of the White Book. I find no application for a recall.

Since it appears clearly by the admission of fact as to the lot numbers on which the bulk plant is located, I cannot do otherwise than to conclude that the proper approach, however cautious it has to be, is to grant the order in terms of the application.

I therefore make an order that the plaintiffs do recover possession of the said lands bearing Lot Nos 231 and 233, Section 13 Bandar Kota Bharu in accordance with O 89 r 6 of the RHC.

Application allowed.

Reported by Kevin Ooi